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THE SIXTEENTH AMENDMENT

Does the Sixteenth Amendment to the Constitution of the United States give Power to Congress to levy Taxes on Incomes from Bonds and other Securities issued by States, Cities, and other Subdivisions of States, and from Salaries and Wages paid by them?

THE original Constitution of the United States provided:[1]

"The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

If this had been all, this would have been general power to levy taxes of all kinds, including, among others, an income tax. But the Constitution cut down what would otherwise have been a general power, so that there was not a general power to levy an income tax:[2]

"No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration hereinbefore directed to be taken."

Also:[3]

"Representatives and Direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers," etc.

The Supreme Court decided in *Pollock* v. *Farmers Loan & Trust Company* [4] that taxes on income or rents from real estate and taxes on income from personal property would all be "direct" taxes; and that, as these would not be taxes apportioned "in Proportion to the Census," or "apportioned among the several States . . . according to their respective Numbers," they would not be such

[1] Article I, Section 8.
[2] Article I, Section 9, clause 4.
[3] Article I, Section 2.
[4] 158 U. S. 601, 635 (1898).

taxes as the Constitution authorized or permitted Congress to levy. The court did not decide that there was power to levy an income tax provided it was apportioned "in Proportion to the Census," and never has decided any such thing. It would be a contradiction, an impossibility.

A tax without apportionment is no tax at all. Suppose Congress enacted, "A tax of $2,000,000,000 is hereby levied." Who would pay it? How much would any one pay? Would any one be exonerated by paying less than all of it? It could not be collected as a tax. The very word "tax" (Greek, τασσω or ταττω, to arrange) implies arrangement, apportionment; and taxes have come to have different names according as they are apportioned in one mode or another.

Cooley on Taxation[5] says, "Apportionment of the burden is therefore a necessary element in all taxation,"[6] and quotes Ruggles, J., in *People* v. *Brooklyn*,[7] "'The power of taxing and the power of apportioning taxation are identical and inseparable. Taxes cannot be laid without apportionment.'"

Therefore to state, as has been done by many recently, that prior to the sixteenth amendment there was "power to levy an income tax," and that all that was lacking was power to apportion it as an income tax, is to state a contradiction.

Thus, we have taxes named according to the bases of apportionment, as *ad valorem* tax, tax by the front foot or acre, or assessment or tax according to benefit; poll, head, or capitation tax; license, franchise, business or occupation tax; import, export tax, etc.

An "income tax" is a tax apportioned on some basis in proportion to income. It need not be at the same rate for small as for large incomes. It is not enough that a tax may be paid out of income. Most taxes of all kinds, except perhaps inheritance taxes, are paid out of income. But that does not make them "income taxes." A tax statute seldom concerns itself as to the fund out of which a tax is to be paid, but always and necessarily concerns itself with the basis of apportionment. That, and that alone, gives the name to the tax.

The state of the law at the time of the decision in the Pollock

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[5] 3 ed., 411. [6] Citing cases. [7] 4 N. Y. 419, 426 (1851).

case was that an income tax on the following incomes could not be levied by Congress:

1. Incomes from real estate.[8]
2. Incomes from personal property of all kinds, including, among others, railroad and other corporation bonds, stocks, debentures, notes, etc.[9]
3. Incomes from bonds and other securities issued by the several states, cities, or other subdivisions of states.[10]
4. Salaries or wages of officers and employees of all kinds of the several states or subdivisions of states.[11]

The court said in the Pollock case that a tax on the gains or profits from business, privileges, or employments might be sustained as an "excise" tax,[12] and that such tax might not have been invalid if it had been made clear in the act that Congress intended to enact that tax without regard to the failure of the other provisions of the act.

Such was the state of the law when a demand arose in 1909 for an income tax, or at least for power in Congress to levy an income tax. An act was passed in 1909 imposing an "excise" tax upon the gains of corporations, and was held valid as such, and not as an income tax act.

President Taft, in a message read in the Senate June 16, 1909, concluded:

"I therefore recommend to the Congress that both houses by a two-thirds vote shall propose an amendment to the Constitution conferring the power to levy an income tax upon the National Government without apportionment among the States in proportion to population."

June 17, 1909, there was introduced, read, and referred to the Finance Committee of the Senate the following proposed amendment to the Constitution:

"The Congress shall have power to lay and collect direct taxes on incomes without apportionment among the several States according to population."

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[8] Pollock case, 157 U. S. 429, 585 (1895); and 158 U. S. 630 (1895).

[9] Pollock case, *supra*.

[10] Pollock case, *supra*.

[11] Collector *v.* Day, 11 Wall. (U. S.) 113, 114 (1870), cited and approved in Pollock case, 157 U. S. 429, 584 (1895).

[12] 158 U. S. 601, 635 (1895).

June 28, 1909, the Senate Finance Committee reported the proposed amendment in a changed form, the same as finally adopted as a part of the Constitution; that is:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

Note that the word "direct" was omitted, and the words "from whatever source derived" were inserted.

July 12, 1909, the same present form of amendment was reported in the House.

The proceedings of the Senate and the House show nothing further of interest as to the form of the amendment.

The state of the law as the result of the decision in the Pollock case on the above points 1 to 4 and as to "excise" tax was fresh in the minds of Congress. That decision was the reason for the amendment. When the word "direct" was stricken out and the words "from whatever source derived" were inserted, it must be presumed that Senators and Representatives knew the meaning of the word "whatever," and knew that among the "sources" of income were bonds and other securities issued by states, cities, and other subdivisions of states, and salaries and wages of officers and employees of states, cities, and other subdivisions of states. When men propose so serious a thing as an amendment to the Constitution they choose their words carefully and use them in their ordinary meaning. Any other course would make an amendment a trap and a mystery.

Congress had at times attempted to levy an income tax on all said sources 1 to 4 and had failed, as the Pollock case and the Day case had decided. The sixteenth amendment gathers up all these failures, omitting none, strikes out the word "direct," which would have made the amendment deal only with "direct" taxes, and inserts the words "from whatever source derived," which include all sources, and says, in fact and in legal effect, whatever has been the state of the Constitution and the decisions and of the law heretofore, and of traditions, politics, states' rights, state sovereignty, structure of the government, relations between the national and state governments, or anything else, for that is always the effect of an amendment to the national Constitution, — whatever

all these may have been, henceforth "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived," etc.

It will not do to argue, as some do, that the amendment was restricted in its purpose to taking away the necessity for apportionment in the case of "direct" taxes, that is, taxes on incomes from real estate or personal property; for the word "direct" was stricken out in order to prevent any such narrow construction, and at the same time the words "from whatever source derived" were inserted in order to make the amendment as broad as language can make it.

There was no exception from the amendment. Had any exception been intended as to incomes from bonds and other securities issued by states, cities, or other subdivisions of states, or from salaries or wages paid by them, it would have been easy so to provide in the amendment. Income from such "sources" is a matter of common, everyday knowledge of all men. It was not overlooked. But what would be the result if it could be shown that Congress overlooked this plain, everyday fact, a fact, moreover, that was made clear in the decision in the Pollock case, which was the decision that made the amendment necessary or advisable? Is an amendment to the Constitution couched in plain, everyday words to be cut down on any such ground? It would be interesting to learn what limit there would be upon changing the meaning of words in an amendment, if words may thus be changed.

Some of those who argue that the sixteenth amendment does not authorize Congress to tax incomes from bonds and other securities issued by states, cities, and other subdivisions of states, and from salaries and wages paid by them, say that this might be done if the amendment made it plain, etc. Pray, what kind of plainness is needed? Is it necessary that the amendment should read, "incomes from whatever source derived, and also incomes from bonds and other securities issued by states, cities, and other subdivisions of states, and from salaries and wages paid by them?" Must our Constitution be ridiculous in order to be "plain"? Let us hold the scales even, and not permit any political ideas to affect a judicial or legal question.

It has been hinted or implied, or perhaps even asserted, in some

of the arguments on this subject, that there is no power to make an amendment authorizing the Congress to tax such incomes.

Article V of the Constitution provides:

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

Here is a general power of amendment with certain exceptions only. The principle of construction is clear that those are the only exceptions that exist. *Expressio unius exclusio alterius est.* It would be impossible to construe documents or language by any other rule.

Of the exceptions in said Article V the first two are limited in time, "prior to the year One thousand eight hundred and eight," which implies that after that date they might be the subject of amendment. The said "first clause in the Ninth Section of the first Article" permitted the slave trade until 1808. Congress promptly abolished it beginning January 1, 1808.

The said "fourth clause in the Ninth Section of the first Article" provided:

"No Capitation, or other direct, Tax shall be laid, unless in proportion to the Census or Enumeration hereinbefore directed to be taken."

Clearly, under this express proviso of said Article V, this fourth clause may be amended in 1808 or at any time afterwards. Obviously taxation is not a forbidden subject, on which no amendment is permitted, even if there be any forbidden subjects, and there are none except only a state's right to equal suffrage in the Senate. This power of amendment in tax matters is not limited at all after 1807.

Much has been written about the "structure of the American

Constitution," "sovereignty of the States," "the National Government and the State Governments are each Sovereign in its sphere," and other such phrases, as if they excluded the power of amendment or change. It is obvious that such phrases do not advance the argument at all.

In pursuance of the power of amendment have been made the first ten amendments, and the thirteenth, prohibiting slavery, and the fourteenth and fifteenth, all three clearly diminishing the power and sovereignty of the states in important matters reserved to them in the original Constitution.

The cases on which writers rely, that the national government cannot tax the states or their instrumentalities, and the states cannot tax the national government or its instrumentalities, were all decided in the absence of provision in the Constitution of the United States expressly authorizing such taxation. Those decisions do not rest upon any ruling that the people of the country cannot by amendment authorize such taxation. The national government has always been one of delegated powers, that is, one must look into the Constitution and its amendments in order to find out what powers it has; but once a power is found in Constitution or amendment, there can no longer be any question of its existence, and language conferring it is to be construed as words are ordinarily construed, even though its effect is to that extent to "restrain or annul the sovereignty of the States."

That the sixteenth amendment affects the "sovereignty of the States" is not an objection. In *Martin* v. *Hunter's Lessee*,[13] Mr. Justice Story, giving the opinion of the court, to the effect that the Court of Appeals of Virginia must obey the mandate of the Supreme Court of the United States, said:

"It has been argued that such an appellate jurisdiction over state courts is inconsistent with the genius of our governments, and the spirit of the constitution. That the latter was never designed to act upon state sovereignties, but only upon the people, and that, if the power exists, it will materially impair the sovereignty of the states, and the independence of their courts. We cannot yield to the force of this reasoning; it assumes principles which we cannot admit, and draws conclusions to which we do not yield our assent.

"It is a mistake that the constitution was not designed to operate

[13] 1 Wheat. (U. S.) 304 342, 343, 344 (1816).

upon states, in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the states in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the states. Surely, when such essential portions of State Sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted that the constitution does not act upon the states. The language of the constitution is also imperative upon the states, as to the performance of many duties.

. . . . . .

"The argument urged from the possibility of the abuse of the revising power, is equally unsatisfactory. It is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse. It is still more difficult, by such an argument, to engraft upon a general power, a restriction which is not to be found in the terms in which it is given."

The above is especially pertinent, not only as to the general power in Article V to make amendments, but also as to the general power in the sixteenth amendment to tax "incomes, from whatever source derived."

Suppose the sixteenth amendment had contained the additional words "and also tax incomes from bonds and other securities issued by states, cities, and other subdivisions of states, and from salaries and wages paid by them." If the argument against the power to make an amendment taxing such incomes means anything, it means that even then the amendment in this respect would be void because beyond the power of an amendment so to provide. If necessary in order to make such amendment effective, the amendment might also add, the courts shall have no power to render this amendment ineffective. But obviously such addition is not necessary, for the mere enactment of the amendment is sufficient notice to the courts that it is to be effective.

The Supreme Court itself is the creature of the same Constitution that provided the general power of amendment, and there is undoubted power to amend as to the structure and functions and even existence of the court itself, and power by amendment to prevent the court from rendering an amendment ineffective, if it were necessary to insert an express provision to that effect. This is not an instance where one who grants what in terms is an all-inclusive power may nevertheless have the grant cut down on the ground

that the grantor lacked authority to make such full grant. An amendment to the Constitution is supreme, and controlling upon the Supreme Court, as well as upon Congress, the President, the states, and the people; and the court has no more right than they to subtract anything from the ordinary meaning of the words "from whatever source derived."

The fact that an amendment changes things from what they were under the Constitution and decisions of the court prior to the amendment is nothing against the amendment, but in its favor; for the very object of an amendment is change from prior conditions.

Frequently it is said that the national government and a state is "each sovereign in its sphere." It would be more accurate, and conducive to clearer thinking, to say that sovereignty is divided between the two, each having the complement of the other's share; and, further, that the Constitution provides how these portions of sovereignty may by amendment be shifted from the state to the nation or the reverse; and that the general power of amendment in Article V puts only one limit or exception upon the power of amendment, namely, that no state without its consent may be deprived of its equal suffrage in the Senate. To deny that portions of sovereignty may be thus shifted would be to deny the power of amendment. All acts of a state are in its sovereign capacity. There are not some acts pertaining to it as a sovereign and others not. Any amendment acts upon its sovereignty.

There was power, then, to make the sixteenth amendment broad enough to tax incomes from bonds and other securities issued by states, cities, and other subdivisions of states, and from salaries and wages paid by them.

The question then comes back to what the language of this amendment naturally means. If a man by will gave income to his wife for life, from his estate, "from whatever source derived," or, if a man made a contract to pay over his "income from whatever source derived," could income from state and municipal bonds, etc., be excluded?

How the words of the sixteenth amendment strike the minds of men generally may perhaps be illustrated from two examples. The *New York Times* of February 21, 1919, in an editorial, said:

"The Treasury is said to rely upon a decision of 1871, although it was rendered before the constitutional amendment taxing income 'from

whatever source derived'. . . . It requires an argument to exempt any income made taxable by plain language both of the law and the constitutional amendment," etc.

The *New York Evening Post*, in an editorial of August 20, 1918, referring to the Pollock case, said:

"This declared . . . that since a municipality was 'one of the instruments of the State Government,' 'a tax on the income from its bonds was a tax on the power of the States,' and therefore unconstitutional. . . . But the courts' objections were naturally removed, when, in 1913, the States approved the Constitutional Amendment that 'Congress shall have power to lay and collect taxes on incomes from whatever source derived,'" etc.

Have those who deny that the power of amendment of the Constitution is general considered fully what would be the conditions if the Supreme Court should decide that the power to amend is limited in some respects, other than that of equal suffrage for each state in the Senate? It would be necessary for the court to give some good and sufficient legal reason for such limitation, treating the question as a strictly legal one. A political reason would not be sufficient, for the court has nothing to do with politics, but only the law, and it would be intolerable that the court should ever undertake to decide cases on political grounds. What in the last analysis would be a remedy for any lack of general legal power to amend the Constitution except revolution? We do not like to think of such a remedy, and there is no need to, for the Constitution itself has provided a full and adequate legal remedy in the general power of amendment.

It would have been quite possible for this nation to have had its central government have all power except what was delegated to the states, as was the effect of the British Parliament Act in respect to the Canadian Government. Perhaps, if our Constitution were to be framed anew to-day, when both communication and transportation are now very much quicker and easier from Maine to California than they were in colonial days from one end of New York or Pennsylvania to the other, our central government might originally have had a much greater share of the sovereignty that was by the Constitution divided between the states and the nation. Some of the thoughtful men of our nation have wondered whether we have not paid, and are not now paying, too high a price in time

and money for all the regulations of forty-eight states as to railroads, fire and life insurance, and generally the doing of business by corporations and individuals in several states, and in a great many other respects, and by having to examine and comply with the endless statutes and multitudes of decisions of the courts in forty-eight states as well as acts of Congress and decisions of United States courts. All of this waste, expense, and burden falls on the ultimate consumer and forms part of our cost of living.

However that may be, when, pursuant to the Constitution, an amendment transfers some function or sovereignty to the national government, the words of the amendment should be read in their ordinary meaning and given full and fair effect.

Our Constitution was adopted to make us a nation: it was not a treaty among states. The Civil War settled that beyond question. But, also, this has been the view of the Supreme Court from an early date. In *Martin* v. *Hunter's Lessee*,[14] Mr. Justice Story, giving the opinion of the court, said:

"The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by 'the people of the United States.' There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be, that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either."

Equal suffrage in the Senate must be preserved, and it may readily be granted that this implies that the states must not cease to exist. But no one believes that an income tax such as Congress might levy on incomes from bonds and other securities issued by states, cities, and other subdivisions of states, and from salaries and wages paid by them, would destroy the states. The same income tax on United States bonds does not destroy the United States, nor does an income tax on individuals and corporations destroy

[14] 1 Wheat. (U. S.) 324, 325.

them. The states are really but the people themselves who elect the very members of Congress who are to levy the taxes. The suggestion that the people cannot be trusted not to destroy themselves or their own state governments by an income tax is absurd. It is not the case of one separate and independent people taxing another and dependent people. An income tax levied by the British Parliament on incomes from bonds issued by London, Liverpool, Manchester, and other cities, would not destroy those cities, and a French income tax on incomes from bonds of Paris, Lyons, Marseilles, and other cities, would not destroy them. Let us get away a little from the provincialism of states' rights and state sovereignty; also let us remember that we have in our country a divided sovereignty, with express provisions in our Constitution by which portions of sovereignty of the states may be transferred from time to time to the national government or the reverse, and it is not the function of the Supreme Court to prevent an amendment from being effective on the ground that it might subtract from the sovereignty of the states, or on the ground that Congress might abuse its power.

On the other hand, there is danger to the nation. Hundreds of thousands of officers and employees of states, cities, counties, towns, and other subdivisions of states, pay no United States income tax on their incomes from such occupations, and billions of bonds issued by states and their subdivisions are likewise now exempt by Congress from United States income tax, and these vast numbers of persons and bonds in these tax-exempt classes are constantly increasing as the states enlarge their functions. The peril to the nation and its revenues ought to be obvious. If not, then let us consider further what would happen to the nation's revenues if all the states should follow the example of North Dakota in taking direct ownership and control, not only of public utilities so called, but also of other industries hitherto deemed private occupations. In that event, how much income would ultimately be left subject to United States income tax, and what would be the peril to the nation, especially in time of war, when an income tax is its chief reliance for revenue?

Some writers have made an argument that prior to the sixteenth amendment the Constitution conferred power to levy income taxes, and that this amendment relieved Congress from the necessity of apportioning income taxes among the states according to the census;

and they, therefore, deny that the sixteenth amendment confers power to tax incomes from bonds and other securities issued by states, cities, and other subdivisions of states, and salaries and wages paid by them. The premises might both be true and yet this conclusion obviously does not follow. When such writers thus state that the amendment *merely* relieved Congress from making such apportionment according to the census, they beg the question. While professing to give effect to the words "from whatever source derived," they give absolutely no effect to those words; for the amendment as first introduced into the Senate would have accomplished all that such writers say was accomplished by the amendment, and they refuse to permit those words, which were carefully inserted by the Senate after the amendment was introduced, to have not only the ordinary meaning but any meaning whatever. It will not do to say that Congress did not mean anything by the words, or did not use them in their ordinary meaning; and it will not do to say that "whatever" means only "some," and that a court has a right as a matter of law to pick out the "some" on what it may conceive to be grounds of political expediency (using the word "political" here, as elsewhere in this article, only in its dignified sense and not as relating to any party politics). Whether the amendment should be adopted was a political question; the construction of it is a strictly legal question.

Moreover, the premise of such writers is not correct that prior to the sixteenth amendment there was power to levy an income tax; for they ignore the fact that there can be no tax without apportionment, and that it is the basis or kind of apportionment that determines the kind of tax. Note how the argument is stated by some who disregard this necessary fact. For example, Mr. Albert C. Ritchie in The American Bar Association Journal for October, 1919,[15] writes:

"The effect of this decision [Pollock] was to make a federal income tax a practical impossibility, because the rule of apportionment among the States applied to such a tax would be manifestly unfair and unjust."

Rather, the learned writer should say, the Pollock case decided that an "income" tax was impossible, but that a "head" tax was possible.

[15] Pages 602, 608.

A little further on Mr. Ritchie seems to have forgotten the "impossibility," for he writes:[16]

"When, now, the sixteenth amendment provides that 'Congress shall have power to lay and collect taxes on incomes,' it did not confer any power to levy income taxes in a generic sense, because that was a power already possessed and never questioned."

Mr. Ritchie then proceeds to refer to the provisions of the Constitution giving power "to lay and collect taxes," and refers to the requirement that all "direct" taxes must be apportioned among the several states according to population, without seeming to realize that these two provisions of the Constitution, both taken together, as they must be, give thus only a power to levy a "head" tax and not an "income" tax. We say the provisions of the Constitution must be taken both together, not only because that is the general rule of construing a document, but also because a tax without an apportionment is an absolute (as well as a "practical") impossibility, and there is no such thing.

Mr. Ritchie continues:[17]

"When, therefore, the sixteenth amendment provides that the power to tax incomes — a power which was not granted by the amendment, because it had always existed — was to be a power to tax incomes 'from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration,' it becomes obvious that the purpose of the amendment was to remove the qualification which the decision in the Pollock case had placed upon income taxes which are direct, namely, that they must be apportioned, and, further, to remove the necessity of examining the source of the income in order to see whether the tax is direct or not."

Here are several erroneous statements. The Pollock case did not decide that "income" taxes which are "direct" must be apportioned (as head taxes, an impossibility), but decided that "income" taxes on incomes from all sources (except those which might be the subject of an "excise" tax, as occupations) were impossible, for they could not be apportioned as an income tax.

Since an "income" tax was impossible, the alleged "qualification which the decision in the Pollock case had placed upon income taxes which are direct, namely, that they must be apportioned"

[16] Page 609. [17] *Ibid.*

as head taxes, is an alleged qualification of a thing which did not exist and could not exist; and, as the thing itself did not exist, neither did the alleged qualification; and it was not the purpose of the sixteenth amendment to "remove the qualification," but its purpose was to confer power to levy income taxes.

Also, it is a perversion of the words of the sixteenth amendment to make it read: "The sixteenth amendment provides that the power to tax incomes . . . was to be a power to tax incomes," etc. The amendment does not read "the power to tax incomes," thus implying that the power already existed. It does not recognize in any way that there was any prior power to tax incomes, and in this it agrees with the Pollock decision (and with Mr. Ritchie in a prior paragraph, "practical impossibility"); and the amendment reads: "The Congress shall have power to lay and collect taxes on incomes," etc.[18]

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[18] Some one may suggest that prior to the sixteenth amendment it would have been possible to levy an income tax as follows: first, apportion the tax among the several states "in proportion to the census," and then inside each state apportion its quota among the population according to income (either with graduated or uniform rates). That, even if possible, would not be an income tax, but a combination head tax income tax. Under such a plan Congress must first fix the total money to be raised by such tax (and not first fix the rate or rates of tax as usual), and then divide this total among the states "in proportion to the census." Thus the personal income tax for the year 1917, according to reports, produced $675,249,450; total census, 1910, was 91,972,266; census of Alabama, 1910, was 2,138,093; and Alabama's share would have been in round figures 1/43 of total, that is, over $15,700,000. The total personal income tax paid in Alabama for 1917 was $1,936,211, about 1/8 of $15,700,000. A person in Alabama (as elsewhere) who had an income of $100,000 in 1917 paid a tax of $16,180; while under the suggested head tax income tax plan he (as all others in Alabama) would have paid, for 1917, eight times as much, that is, he would have paid $129,440 ($29,440 more than his total income) if the same proportionate graduated rates had been levied in the state as were levied under the United States Income Tax Acts for 1917. Under the greatly increased rates for 1918, 1919, and 1920, the payments required in Alabama under such plan would have been much greater, and the results more impossible and absurd.

Under such plan, after the total quota of each state had been fixed, it would be necessary in each of the forty-eight states first to ascertain the total incomes of all persons by having returns made, and then compute the rate, with extended fraction, necessary to levy the exact amount each person must pay in order to produce the exact total quota of the state, — no more and no less than the exact "pound of flesh," for that would violate the requirement of the Constitution that "direct" taxes be laid "in proportion to the census." Graduated rates, if possible at all, would involve almost endless calculations in extended fractions.

The Pollock case, however, decided that a tax on incomes from gains or profits of business, privileges, or employments, that is, occupations, is an "excise," and the

Furthermore, even if there had been some sort of power to levy an income tax (though in the Pollock case the Supreme Court held that there was power only to levy an "excise" tax, as on occupations, etc.) yet the sixteenth amendment is good according to its terms as a plain and general grant of power in unambiguous language. It has never been the law that a second grant or deed in general words is to be cut down because there happened to be a prior grant or deed in defective, or even effective, terms, so that there would be less granted than is stated in the general terms of the second grant or deed. Did any court ever treat a confirmatory deed or statute in such a way?

It remains to consider certain cases decided by the Supreme Court, since the sixteenth amendment, that have been cited as supporting views different from those here stated, to wit: *Brushaber* v. *Union Pacific Railroad Co.*,[19] *Stanton* v. *Baltic Mining Co.*,[20] *Tyee Realty Company* v. *Anderson*,[21] and *Peck* v. *Lowe*.[22]

It is pertinent to keep in mind the principles upon which courts act in dealing with constitutional questions. Judge Cooley states some of them as follows:[23]

"Neither, as a rule, will a court express an opinion adverse to the validity of a statute, unless it becomes absolutely necessary to the determination of a cause before it. Therefore, in any case where a

Constitution requires that all "excise" taxes be "uniform." So we must revise the above calculations by excluding all such occupation incomes and all such "excise" taxes; for they cannot be apportioned "in proportion to the census." Therefore, under such head tax income tax plan there would need to be (in order to reach also occupation incomes) two sets of taxes, one a head tax income tax and the other an "excise." The effect of such revision would be a still more grotesque result in Alabama, as well as in other states.

It is no wonder that in the early case of Hylton *v.* United States, 3 Dall. 171, Mr. Justice Iredell, after considering a suggested similar double apportionment of a carriage tax and the unequal and impossible results, said: "This mode is too manifestly absurd to be supported, and has not even been attempted in debate."

Note that the Constitution says "direct" taxes shall be laid "in proportion to the census or enumeration herein before directed to be taken," and stops there, and there is no provision whatever for any second apportionment within each state in proportion to income. The Pollock case did not decide that there could be such second apportionment, but decided that an income tax on incomes from real estate and personal property would be a "direct" tax and could not be levied as an income tax, that is, apportioned according to income.

[19] 240 U. S. 1 (1916).

[20] *Ibid.*, 103 (1916).

[21] *Ibid.*, 115 (1916).

[22] 247 U. S. 165 (1918).

[23] COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW, 2 ed., 152, 153, 154, *et seq.*

constitutional question is raised, if the record presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, the court will adopt that course, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when, consequently, a decision upon such question will be unavoidable."

It is to be noted that since the sixteenth amendment was ratified in 1913 no act of Congress has undertaken to tax incomes from bonds and other securities issued by states, cities, and other subdivisions of states; and, if the 1919 act of Congress undertook to tax salaries and wages paid by states and their subdivisions (as some contend), the Treasury Department has refused to take that view and has not attempted to collect such taxes. Hence no case has arisen before the Supreme Court involving the validity of such provisions of any act of Congress.

We may be sure that the learned justices of the Supreme Court would be among the first to disclaim any statement or implication that they had undertaken to decide any question of the constitutionality of a proposed act of Congress in advance of the passage of such act. Their jurisdiction extends only to cases, and to express an opinion in advance upon a bill in Congress is neither their function nor custom. As Professor Thayer and others have pointed out in their writings, the Supreme Court in 1793 declined to advise President Washington as to questions arising under treaties with France, deeming it "improper to enter the field of politics by declaring their opinion on questions not growing out of the case before them."

The case of *Brushaber* v. *Union Pacific Railroad Co.*[24] involved the validity of the income tax provisions of the act of October 3, 1913, as taxing gains of a railroad corporation. The case did not involve any tax on incomes from bonds or other securities issued by states, cities, or other subdivisions of states, or from salaries or wages paid by them.

Mr. Chief Justice White states and numbers all the contentions made in the case, and not one of them involves in any way whatever any question of the power of Congress to tax incomes from such bonds or securities or such salaries or wages. In view of these

[24] 240 U. S. 1 (1916).

indisputable facts it seems unfair to the learned Chief Justice to assert that he or the court undertook in the Brushaber case to pass upon a constitutional question which (1) was not involved in the case, and (2) to do so in advance of any act passed by Congress under which the question might arise, and (3) in the absence of arguments by counsel upon such constitutional question. Such is not the custom of the Supreme Court.

In *Stanton* v. *Baltic Mining Company*,[25] the question was as to the validity of the provisions of the act of October 3, 1913, taxing incomes of mining companies, and no more involved the questions now under discussion than did the Brushaber case.

In *Tyee Realty Company* v. *Anderson*,[26] the question was as to the validity of the provisions of the same act taxing income of a realty company, and did not involve at all the questions now under discussion.

In *Peck* v. *Lowe*,[27] a corporation engaged in buying goods in the several states and shipping them to foreign countries questioned the right of the government to levy an income tax under the Act of 1913 on so much of its income as arose from shipping goods to foreign countries and there selling them, claiming that this was within the prohibition of the Constitution, that "No tax or duty shall be laid on articles exported from any State." The court said: "The Sixteenth Amendment, although referred to in argument, has no real bearing and may be laid out of view." After considering the decisions, the court held that the prohibition of an export duty on articles did not prohibit an income tax on the corporation in respect of the gains made in the business above mentioned. So the court did not need to consider whether, if the clause of the Constitution which prohibited an export tax would otherwise prohibit an income tax on such income, nevertheless an income tax could be supported by the sixteenth amendment acting as a repeal *pro tanto* of such export tax prohibition. The court did say: "As pointed out in recent decisions, it [the sixteenth amendment] does not extend the taxing power to new or excepted subjects," etc., citing *Brushaber* v. *Union Pacific Railroad Co.* and *Stanton* v. *Baltic Mining Co.*, above referred to. But this case, of *Peck* v.

[25] 240 U. S. 103 (1916).
[26] *Ibid.*, 115 (1916).
[27] 247 U. S. 165 (1918).

Lowe, was decided by the court, as is stated by the court itself on the ground that a tax on an exporter's income is not a "tax on exports." Furthermore, as above pointed out, neither the Brushaber case nor the Stanton case really involved any such question as these words quoted from the opinion in the case of *Peck* v. *Lowe* might indicate.

It is respectfully submitted that the sixteenth amendment clearly gives power to Congress to tax incomes from bonds and other securities issued by states, cities, and other subdivisions of states, and from salaries and wages paid by them.

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